

Decision 03-12-050 December 18, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition for Authority to Transfer Control or
Ownership of NUI Telecom, Inc. to Telecom
Acquisition Company, LLC. (U-6641-C)

Application 03-11-007
(Filed November 7, 2003)

OPINION GRANTING INDIRECT TRANSFER OF CONTROL

1. Summary

This decision authorizes NUI Capital Corp. (Seller) to transfer control of NUI Telecom, Inc. (NUI) to Telecom Acquisition Company, LLC (TAC). This transfer of control is to take place through the sale of 100% of the issued and outstanding capital stock of NUI by Seller to TAC, as more fully described in the application and exhibits attached to the application.

2. Background

NUI, a New Jersey corporation qualified to transact business in California, was granted a Certificate of Public Convenience and Necessity (CPCN) to operate as a switchless reseller of inter-Local Access and Transport Area (LATA) and intra-LATA telecommunications services offered by communication common carriers in California. This authority was granted on March 11, 2002 pursuant to Decision (D.) 02-03-027, which assigned NUI its corporate identification number U-6641-C. Its principal place of business is 550 Route 202-206, Bedminster, New Jersey.

NUI is also authorized to provide intrastate telecommunications services in 48 other states and local exchange services in 21 other states either pursuant to

certification, registration, tariff requirements, or on an unregulated basis. Further, NUI is authorized by the Federal Communications Commission to provide domestic interstate and international services as a non-dominant telecommunications carrier.

Seller, a Florida corporation, indirectly controls NUI through its 100% ownership of NUI issued and outstanding capital stock. It maintains the same address as NUI for its principal place of business.

TAC, a New Jersey corporation, is a limited liability company with managerial and financial expertise in the field of telecommunications. Its operations officer Richard Boudria and Bill Mulcahy are also the present operating officers of NUI. Its principal place of business is at the same location as NUI and Seller. As of October 16, 2003, TAC had \$7 million in cash and \$3 million in equity.

3. Requested Authority

On November 8, 2003, Applicants NUI, Seller and TAC filed this application requesting approval of the transfer of an indirect control of NUI to TAC from Seller. This transfer of indirect control is to take place pursuant to an October 30, 2003 Stock Purchase Agreement, a copy of which is attached to the application. Pursuant to that agreement, Seller will exchange its 100% of the issued and outstanding capital stock of NUI to TAC in exchange for \$2 million cash. This proposed transaction isn't scheduled to close until all of the conditions set forth in the Stock Purchase Agreement have been satisfied.

Applicants state that the proposed transaction is in the public interest because it will enable NUI to access the financial resources it needs to introduce new products and services and to respond to competition in the telecommunications environment. NUI also expects to benefit from increased

economies of scale that will permit it to operate more efficiently and thus to compete more effectively.

TAC seeks to acquire all the capital stock of NUI as an investment. Upon approval of this transfer of control NUI, with 404 customers, will continue offering its current services and using the same name and operating authority.

A review of the Commission's Consumer Affairs Branch records shows that NUI has not received any service complaints. NUI is also current on reporting and transmitting the user fees applicable to its California operations. There were no protests to this application.

4. Discussion

Applicants seek approval of the proposed transfer of indirect control pursuant to Pub. Util. Code § 854. Section 854(a) states, in relevant part, as follows:

No person or corporation...shall merge, acquire, or control...any public utility organized and doing business in this state without first securing authorization to do so from the commission...Any merger, acquisition, or control without that prior authorization shall be void and of no effect.

The Commission has broad discretion to determine if it is in the public interest to authorize a transaction pursuant to § 854(a).¹ The primary standard used by the Commission to determine if a transaction should be authorized under § 854(a) is whether the transaction will adversely affect the public interest.²

¹ D.95-10-045, 1995 Cal. PUC LEXIS 901, *18-19; and D.91-05-026, 40 CPUC 2d 159, 171.

² D.00-06-079, p. 13; D.00-06-057, p. 7; D.00-05-047, p. 11 and Conclusion of Law (COL) 2; D.00-05-023, p. 18; D.99-03-019, p. 14; D.98-08-068, p. 22; D.98-05-022, p. 17;

Footnote continued on next page

The Commission may also consider if the transaction will serve the public interest.³ Where necessary and appropriate, the Commission may attach conditions to a transaction in order to protect and promote the public interest.⁴ For the following reasons, we conclude that it is reasonable to grant this § 854(a) application. First, NUI will continue to operate as it has in the past, using the same name and operating authority. Second, the public may benefit from the indirect transfer of control to the extent the transaction enhances NUI's ability to maintain and expand its services and operations in California. Third, there is no opposition to this application. For these reasons, we see no reason to withhold authority for the transfer of control before us here.

5. Category and Need for Hearing

In Resolution ALJ 176-3123, dated November 13, 2003, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were not necessary. Based on the record, we affirm that this is a ratesetting proceeding, and that hearings are not necessary.

D.97-07-060, 73 CPUC 2d 601, 609; D.70829, 65 CPUC 637, 637; and D.65634, 61 CPUC 160, 161.

³ D.00-06-005, 2000 Cal. PUC LEXIS 281, *4; D.99-04-066, p. 5; D.99-02-036, p. 9; D.97-06-066, 72 CPUC 2d 851, 861; D.95-10-045, 62 CPUC 2d 160, 167; D.94-01-041, 53 CPUC 2d 116, 119; D.93-04-019, 48 CPUC 2d 601, 603; D.86-03-090, 1986 Cal. PUC LEXIS 198 *28 and COL 3; and D.8491, 19 CRC 199, 200.

⁴ D.95-10-045, 62 CPUC 2d 160, 167-68; D.94-01-041, 53 CPUC 2d 116, 119; D.90-07-030, 1990 Cal. PUC LEXIS 612 *5; D.89-07-016, 32 CPUC 2d 233, 242; D.86-03-090, 1986 Cal. PUC LEXIS 198 *84-85 and COL 16; and D.3320, 10 CRC 56, 63.

6. Expedited Approval

Applicants have requested expedited approval of this application by the Executive Director. Ordering Paragraph 1 of D.87-10-035 provides in relevant part that the Executive Director may grant noncontroversial applications by nondominant telecommunications carriers for authority to transfer assets or control under §§ 851-855.⁵ However, TAC does not qualify for expedited approval by the Executive Director because TAC is not a California certificated nondominant telecommunications carrier.

6. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

7. Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and Michael J. Galvin is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. NUI possesses a CPCN to provide interLATA and intraLATA telecommunications services under the U-6641-C corporate identification number.
2. Applicants seek authority for TAC to acquire indirect control of NUI through a transfer of 100% of the issued and outstanding capital stock of NUI.

⁵ CPUC2d 459 at 462 (1987).

3. Pub. Util. Code § 854(a) requires Commission authorization to transfer control of a public utility. Any transfer of control without Commission authorization is void under the statute.

4. NUI, with 404 customers, will continue offering its current services and using the same name and authority after the transfer of indirect control.

5. NUI has not received any service complaints.

6. NUI is current on reporting and transmitting the user fees applicable to its California operations.

7. There is no opposition to this application.

8. TAC has the technical, managerial, and financial qualifications necessary to exercise indirect control of NUI.

Conclusions of Law

1. This is a ratesetting proceeding and no hearing is necessary.

2. This application should be approved and become effective immediately because it is not adverse to the public interest and the public may benefit from TAC's ability to maintain and expand NUI's services and operations in California.

O R D E R

IT IS ORDERED that:

1. NUI Capital Corp. is authorized pursuant to Sections 851-844 of the Public Utilities Code to transfer 100% of the issued and outstanding capital stock of NUI Telecom, Inc, (NUI) to Telecom Acquisition Company, LLC (TAC), as more fully described in the application and exhibits attached to the application.

2. NUI and TAC shall notify the Director of the Commission's Telecommunications Division in writing of the transfer of control, as authorized

A.03-11-007 ALJ/MFG/jva

herein, within 10 days of this order. A true copy of the instrument(s) of transfer shall be attached to the notification.

3. Application 03-11-007 is closed.

This order is effective today.

Dated December 18, 2003, at San Francisco, California.

MICHAEL R. PEEVEY

President

CARL W. WOOD

LORETTA M. LYNCH

GEOFFREY F. BROWN

SUSAN P. KENNEDY

Commissioners